R.D. # 0001-03
Secaucus, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

CALIGOR PHYSICIANS AND HOSPITAL SUPPLY CORP.[1] Employer	
and	**CASE 22-RC-12311**
INTERNATIONAL CHEMICAL WORKERS UNION COUNCIL, UNITED FOOD AND COMMERCIAL WORKERS UNION, AFL-CIO Petitioner	

DECISION AND DIRECTION OF ELECTION

1. Introduction

The Petitioner and the Employer are in agreement that the appropriate unit here consists of full-time and regular part-time employees working in the classifications of machine operator, maintenance employee, shipping employee, receiving employee, inventory control employee, production employee, picker, quality control employee, replenishment employee, put away employee, auditor and plant clerical employee employed by the Employer at its Secaucus, New Jersey facility, excluding all office clerical employees, guards and supervisors as defined in the Act. The Employer argues, contrary to the Petitioner, that the petitioned-for unit must also include those employees in the above

[1] The Employer's name appears as amended at the Hearing.

classifications employed through temporary agencies, herein called supplier employees or temporary employees.

For the reasons set forth below, I find that the community of interest that supplier employees share with the Employer's solely employed employees (also sometimes referred to herein as permanent employees) is not so compelling that it requires or mandates their inclusion in the unit.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the Board. Upon the entire record in this proceeding,[2] I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act; and it will effectuate the purposes of the Act to assert jurisdiction herein.[3]
3. The labor organization involved claims to represent certain employees of the Employer.[4]
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act for the reasons described *infra*:

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[2] Briefs filed by the parties have been fully considered.

[3] The Employer, a New York corporation, provides warehousing and distribution services at its Secaucus, New Jersey facility, the only facility involved herein.

[4] The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

All full-time and regular part-time employees working in the classifications of machine operator, maintenance employee, shipping employee, receiving employee, inventory control employee, production employee, picker, quality control employee, replenishment employee, put away employee, auditor and plant clerical employee employed by the Employer at its Secaucus, New Jersey facility, excluding all office clerical employees, temporary employees, guards and supervisors as defined in the Act, and all other employees.

2. Facts

A. The Employer's Operations

The Employer provides warehousing and distribution services for medical supplies for office based practitioners, hospitals and extended care facilities. In this regard, it performs inbound receiving, put away and storage functions and distribution entailing packing and shipping. In furtherance of these functions, the Employer operates a warehouse in Secaucus, New Jersey utilizing the following departments: receiving, put away, replenish, production (first and second shifts), shipping, inventory control and auditing. Each department has a supervisor: Derek Penn-receiving department, Juan Oliveria-put away, Raul Oliveria-replenishment, Javier Zevalla-first shift production, Jorge Rodriguez-second shift production and Charles McCloud-shipping.[5] The supervisors for inventory control and auditing are not named. Kevin McDonnell is the Employer's Director of Operations; he is responsible for the operational aspects at the employer's Secaucus facility. Nancy Mercado is Human Resources Manager. The Employer uses contractors to provide driving services.

The Employer employs approximately 80 employees in the following unit classifications to accomplish its work: machine operator, maintenance employee, shipping employee, receiving employee, inventory control employee, production employee, picker, quality control employee, replenishment employee, put away employee, auditor and plant clerical employee. The Employer operates 5 work shifts covering approximately 23 hours a day, six days per week.

[5] There is to be no dispute that these departmental supervisors should be excluded from the unit found appropriate.

B. Use of Temporary Employees

The Employer uses the services of two temporary staffing agencies to provide workers as needed. At the time of the hearing, the Employer used approximately 30 to 35 supplier employees in many unit classifications and on all shifts. Ventury Staffing and Pomerantz Staffing, herein collectively called the Agencies, are the supplier agencies used by the Employer. The record does not describe the business or corporate relationships, if any, between the supplier Agencies and the Employer. The Employer asserts that it is a joint-employer of the temporary employees it uses. The Petitioner did not address this assertion.

The record reveals that the Agencies are aware of the Employer's shift schedules and unit job descriptions and provide temporary employees to fill requested positions, as needed. In this regard, the Employer's Human Resources Manager calls the Agencies with requests indicating a specific job and shift, which are filled the following day. Some jobs are for a day or two, whereas others are for longer periods. The Employer asserts that over the past two years, these supplier employees have been the sole source of its permanent work force.[6] In this regard, the Employer asserted that it converted approximately 35 supplier employees to permanent status over the past two years. It appears that the average length of time that a temporary employee remains in such status before conversion is currently 5 to 6 months; prior to a year and a half ago, the average period was 12 months before conversion. The record does not disclose the aggregate number of supplier employees used by the Employer during the year. The Employer decides which temporary employees will be offered conversion to permanent status.

The operative agreements between the supplier Agencies and the Employer were not introduced into evidence, nor were their terms described. Accordingly, there is no evidence as to whether these Agreements have any impact upon Employer decisions regarding the hire of supplier employees.

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[6] One exception was for a skilled unit position, conveyer mechanic, which the Agencies were not able to fill; thus the Employer hired someone directly into that position.

The record discloses that when temporary employees first report for work at the Employer's facility, they meet with the Human Resources Manager. She provides them with a time card, explains to them the possibility of becoming permanent after 6 months, emphasizes the importance of appropriate adherence to time and attendance, shows them how to use the time clock[7] and introduces them to their department supervisors. The Human Resources Manager also advises these temporary employees that, in the future, they will be "shown a sexual harassment class."

(1) Common Terms and Conditions

Supplier employees work side by side with permanent employees performing the same work, using the same equipment (radio frequency devices, handheld computers, pallet jacks, hi-lo trucks and reach trucks) and working the same hours. Supplier employees work on all shifts, as needed, and in most unit classifications. Supplier employees are supervised by the same supervisors as permanent employees. The Agencies have no supervisory presence at the Employer's facility.

The record reveals that supplier employees, like permanent employees, are subject to the same Employer policies regarding theft, work place violence, sexual harassment and drug use. Likewise, Employer emphasizes adherence to its attendance policies. Additionally, temporary employees participate in cholesterol, diabetes, flu shot and blood pressure screening programs as well as summer barbecue, Christmas party and theme day events. Temporary employees wear the same identification badges as permanent employees.

(2) Different Terms and Conditions

The record discloses that temporary employees are paid by their Agencies, although the pay checks are distributed by the Employer; permanent employees are paid weekly by the Employer. Permanent employees, unlike temporary employees, receive Employer provided health benefits, life insurance, paid vacation, personal days, sick leave benefits and are eligible for participation in a 401(k) savings plan. The record does not describe what

[7] It appears that supplier employees use a time clock while permanent employees utilize an ADP swipe system.

benefits, if any, temporary employees receive from their employing Agencies. Permanent employees also receive an employees' handbook, which supplier employees do not.

With regard to discipline, permanent employees are subject to a progressive disciplinary system that includes verbal and written warnings prior to discharge. Although the Employer contends that it disciplines temporary employees, it acknowledges that the form of discipline is counseling and not the progressive system noted above. In this connection, the Employer merely ceases to use supplier employees it does not want.

The Employer contends that it sets the starting rate of pay for supplier employees at $8.00 per hour or, if the employees are on late shifts after 7:00PM or have special skills, $9.00. The Employer further asserts that temporary employees receive a wage increase of $1.00 after six months of employment, if not converted to permanent status. However, it appears that this practice occurred at the time when the conversion process occurred following a 12-month period.

Permanent employees receive a minimum of $10 per hour, with a 10% late shift differential; skilled employees receive a $.50 additional stipend.

3. DISCUSSION

As noted above, the issue here is whether temporary employees should be included in the unit found appropriate herein. The Employer contends that the temporary employees are jointly employed by the Employer and the supplier Agencies, Ventury Staffing and Pomerantz Staffing, sharing a community of interest with the Employer's permanent employees and, therefore, should be included in the bargaining unit found appropriate herein. The Petitioner maintains that the temporary employees do not share a community of interest with other employees of the Employer included in the bargaining unit and should therefore be excluded.

The record establishes that the employees solely employed by the Employer, whom the Petitioner seeks to represent, excluding temporary employees supplied by Agencies, constitute an appropriate unit for collective bargaining. Accordingly, and as discussed

below, I find that the temporary employees are jointly employed by the Employer and the supplier Agencies but do not share such a strong community of interest with the other employees included in the bargaining unit which would compel their inclusion in the unit.

A. Joint Employer Issue

Whether or not the temporary employees supplied by the Agencies to the Employer should be included in the petitioned for voting unit is governed by the Board's decision in *M. B. Sturgis, Inc.*, 331 NLRB 1298 (2000). Under *Sturgis*, temporary employees can only be included in a unit with employees who are solely employed by the user employer if the user employer and supplier employer are joint employers and the employees share a community of interest. Above at 1305.

In order to establish that two or more employers are joint employers, it must be shown that the entities share or codetermine matters governing essential terms and conditions of employment. *M. B. Sturgis, Inc.*, above at 1301 citing *NLRB v. Browning Ferris Industries,* 691 F.2d 1117, 1123 (3d Cir. 1982); *Riverdale Nursing Home,* 317 NLRB 881, 882 (1995). There can be no finding of joint employer status unless the two employers jointly and meaningfully affect matters that relate to the employment relationship of the jointly employed employees, such as hiring, firing, disciplining, supervising and directing. *Riverdale Nursing Home*, above at 882.

It appears the Agencies are responsible for interviewing, selecting and hiring all employees supplied to the Employer and that they are solely responsible for discharging the temporary employees.

The record establishes that the Employer assigns, directs and oversees the daily work of the employees supplied by the Agencies. In addition, the employees supplied by the Agencies perform the same duties and share the same employee facilities as the employees exclusively employed by the Employer. While the Employer may not be able to discharge Agencies' employees, it clearly can have the employee removed from its service. The Employer also monitors the time worked by the temporary employees in its service.

Based upon the above, it is apparent that the Employer and the Agencies affect and codetermine essential terms and conditions of employment of the temporary employees supplied by the Agencies to the Employer. Accordingly, I find that the Employer and the Agencies are joint employers regarding the employees supplied by them to the Employer. *Riverdale Nursing Home*, 317 NLRB at 882.

B. Appropriate Community of Interest Test

In making a determination as to whether a petitioned-for unit is appropriate, the Board has held that Section 9(a) of the Act only requires that the unit sought by the petitioning union be an appropriate unit for purposes of collective bargaining. Nothing in the statute requires that the unit be the only appropriate unit or the most appropriate unit. *Morand Brothers Beverage Co.,* 91 NLRB 409, 418 (1950). The Act only requires that the unit sought be an appropriate unit for the purposes of collective bargaining. *National Cash Register Co*., 166 NLRB 173, 174 (1966).

Although the unit sought by a petitioning labor organization is a relevant consideration in determining the scope of a bargaining unit, a union is not required to seek representation in the most comprehensive grouping of employees unless an appropriate unit compatible to the unit requested does not exist. *Overnite Transportation Company*, 322 NLRB 723 (1996); *Dezcon, Inc*., 295 NLRB 109, 111 (1989). Although an employer may seek a broader unit and that unit may be appropriate, it does not necessarily render the petitioner's unit inappropriate. *Overnite Transportation Co.,* above.

Having found that the Employer is a joint employer with the Agencies, I must determine whether or not the jointly employed employees and the solely employed employees of the Employer share a community of interest. In applying a community of interest test, the Board analyzes bargaining history, functional integration, employee interchange, employee skills, work performed, common supervision and similarity in wages, hours, benefits and other terms and conditions of employment. *J.C. Penney Co.,* 328 NLRB (1999); *Armco, Inc.,* 271 NLRB 350, 351 (1984).

The record clearly discloses that the jointly employed employees share some interest with the solely employed employees of the Employer whom the Union seeks to represent. The two employee groups work side-by-side, perform identical work under the same supervision and working conditions and work essentially the same hours. The Employer monitors the time of temporary employees furnished by the Agencies, which it forwards to the Agencies for payroll purposes. Based upon the above, it appears that the jointly and solely employed employees of the Employer have many common interests and may share a community of interest. *Swift* & Co., 129 NLRB 1391 (1961); *Kalamazoo Paper Box,* 136 NLRB 134 (1962). However, although a unit including the temporary employees may be appropriate, I find that they do not share "such a strong community of interest that their inclusion in the unit is required." *Engineered Storage Products Co.*, 334 NLRB No. 138 (2001).

The record also reveals that there are major differences in the terms and conditions of employment between the employees supplied by the Agencies and the Employer's permanent employees. In this regard, the jointly employed employees are hired by the Agencies without any input by the Employer. These temporary employees are carried on the Agencies' payrolls. The jointly employed employees are not entitled to benefits furnished by the Employer for its solely employed employees. Fringe benefits, if any, enjoyed by the temporary employees are provided by the Agencies. Temporary employees utilize a separate time clock. Although it appears that the Employer can have a jointly employed employee removed from service, the Agencies have the sole responsibility to discharge employees whom they supply the Employer. The employees supplied by the Agencies do not automatically become regular employees of the Employer. Although the Employer asserted that its sole source of permanent employees was its temporary employees, I note that it also recently hired a skilled employee directly. As noted above, the Employer does not apply its progressive disciplinary procedure for its permanent employees to its temporary employees. Although the Employer sets the initial wage rates for temporary employees, it is clear that

these rates (including shift differentials) are less than, and thus different from, those received by permanent employees.

Although the jointly employed employees supplied by the Agencies share a community of interest with the Employer's permanent employees, I find that the character of this community of interest does not require that they must be included in the unit or that the petitioned for unit is inappropriate. In such circumstances, the Board has held that the "test is whether the community of interest they share with the solely employed employees is so strong that it requires their inclusion in the unit." *Engineered Storage Products Co*., above slip op. at 1; *Overnite Transportation Co*., above. I find that the facts here do not meet this test. In this regard, as noted above, the Agencies hire and fire their own employees, set their benefits and maintain their own payrolls. Further, the temporary employees have different wage rates, shift differentials, use a separate time clock and are not subject to progressive discipline. Thus, I find that the temporary employees do not share such a strong community of interest that their inclusion in the unit is required. *Engineered Storage Products Co*., above; *Lodgian, Inc. d/b/a Holiday Inn City Center*, 332 NLRB No. 128 (2000).

The Employer's reliance upon *Outokumpu Copper Franklin, Inc.,* 334 NLRB No. 39 (2001) to support its position that the jointly employed employees share a community of interest with the Employer's permanent employees and should be included in the unit is misplaced. In *Outokumpu*, the Board held that the temporary employees supplied to *Outokumpu* from three staffing agencies shared a community of interest and should be included in the voting unit because the temporary employees worked side-by-side with the employer's production and maintenance employees in all areas of the plant, the employer's supervisors had full authority to discipline, discharge and send home the temporaries, the employer's supervisors evaluated temporaries for future employment, the temporaries were the sole source for the employer's regular production and maintenance employees and the employer exclusively determined the wage rates the temporary employees would receive.

There are similarities between the facts in *Outokumpu* and those here, including that the main source of the Employer's permanent employees is its temporary employees. On the other hand, many of the facts present in *Outokumpu* are not present in the instant case. For instance, here, the Agencies' hiring of the temporaries whom it supplies to the Employer is not based on criteria determined by the Employer. Also, the Board noted in *Outokumpu* that, unlike here, the employer's supervisors had full authority to discipline, discharge and send home temporaries supplied to it. More importantly, facts present here were not present in *Outokumpu.* Thus, as noted in greater detail above, here the Agencies hire and fire their own employees, set their benefits and maintain their own payrolls. Further, temporary employees have different wage rates and shift differentials, use a separate time clock and are not subject to progressive discipline.

In *Outokumpu*, the Board found that "dissimilar terms and conditions of employment are substantially outweighed by the many common terms and conditions of employment shared by the regular and temporary employees." In the instant matter, I conclude that the dissimilar terms and conditions of employment of the temporary employees supplied by the Agencies and the Employer's solely employed employees, as recited at length above, substantially outweigh the common terms and conditions of employment.

Interstate Warehousing of Ohio, LLC, 333 NLRB No. 83 (2001), also relied upon by the Employer, is likewise distinguishable from the instant case. In that case, the petitioner, contrary to the employer, sought to include the jointly employed employees with the solely employed employees. Because the petitioner there sought to include the jointly employed employees, the issue before the Board was whether they shared a sufficient community of interest so they could be included in the petitioned for unit. In contrast, the Petitioner here does not seek to represent the temporary employees whom the Employer seeks to include in the unit. In consequence, the issue here is whether the jointly employed employees share such a strong community of interest as to require their inclusion in the unit. *Engineered Storage Products Co*., above.

In view of the above and the record as a whole, I find that the temporary employees supplied by the Agencies to the Employer do not share such a strong community of interest with the Employer's permanent employees that their inclusion is required. There are sufficient dissimilarities between the two groups of employees to warrant a finding that the employees employed solely by the Employer constitute an appropriate unit. For all of these reasons, I will exclude from the bargaining unit the temporary employees furnished by the Agencies to the Employer. *Engineered Storage Products Co*., above; *Lodgian, Inc. d/b/a Holiday Inn City Center*, above; *Overnite Transportation Co.,* above; *M. B. Sturgis, Inc.,* above.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned Regional Director among the employees in the unit found appropriate at the time and place set forth in the notices of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in an economic strike who have retained their status as strikers and have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike that have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period;

(2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether or not they desire to be represented for collective bargaining purposes by **International Chemical Workers Union Council, United Food and Commercial Workers Union, AFL-CIO**.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters in the unit found appropriate above shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in NLRB Region 22, 20 Washington Place, Fifth Floor, Newark, New Jersey 07102, on or before **March 18, 2003**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed

to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. The Board in Washington must receive this request by March 25, 2003.

Signed at Newark, New Jersey this 11th day of March 2003.

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